IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 2 OF 2006

SHRI ANANT ALIAS VENKATESH NAIK AND ANR., ... Appellants

Versus

SHRI ANANT LAXMAN BORKAR AND 8 ORS., ... Respondents

MrS.D. Lotlikar, Sr. Advocate with Mr. R. menezes for the Appellants.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr. I. Agha for R.3, 4 and 5.
Mr. M. Pereira, for R.7,
Mr. S. D. Padiyar, For Respondent No. 8.

Coram:- S.A.BOBDE, J.

Date:- 22nd March, 2007

P.C.:

Heard.

2. This is an appeal against the Order dated 14th October, 2005 passed by the Ist Additional District Judge, Panaji refusing injunction to the appellants. The appellants filed a suit for injunction in respect of a neighbouring plot of land. According to the appellants the construction made by the respondent is not in accordance with law. Later on the plaint has been amended that the construction already made is not in accordance with the Rules and therefore the respondent should not be granted an occupancy certificate.

3. The nature of breaches alleged by the appellants are that the respondent has wrongly included a part of public drain into his property; the height of the building is in excess of what is permitted by law and there is some misrepresentation of the area of the plot. The trial Court has

dismissed this application for injunction by the order in appeal. While doing so, the trial Court has referred to an earlier Order dated 17.7.04 dismissing the appellants application for temporary injunction. The trial Court is therefore of the view that there is no need to consider the application afresh because it is barred by the principle of res judicata. It is sufficient for the purpose of refusal of injunction that in the same suit an application was made substantially on the same ground and that has been rejected.

4. Mr. Lotlikar, learned counsel for the appellants has submitted that the cause of action has changed now, since the respondent has shown a public drain to be a part of his property which is not permissible and moreover he has made certain representations to the Planning Authority for the purpose of obtaining an occupancy certificate.

5. As far as the first part is concerned, namely the showing of the public drain as a part of the respondent's property, it appears that this was considered by the trial Court even earlier and in the Order dated 17.7.04 the trial Court has dealt with the earlier observations in paragraph 9 of the order in appeal. However, there appears to be some justification regarding the second grievance that the respondent's construction is not entirely according to Rules since the Planning Authority has stated in the affidavit of one A.P. Diniz dated 21st August, 2006 as follows :-

" 4. I say that according to the survey plan produced for development the width of the nullah varies between 1 meter to 1.5 mts. I further state that the said nullah does not have any separate number and as per our perception the said nullah would be public property and not belonging to any individual.

.....

8. I say that I shall not grant completion certificate if any portion of the building does not confirm to the rules in force. "

6. There is also a subsequent affidavit filed by the same authority on 13th October, 2006. On reading of the two affidavits together, some irregularity is disclosed. However that is a matter which will have to be finally decided and not at this stage. In any case, I am of view that the issue of grant of completion certificate will depend on the spot appraisal of the construction done by the respondent with reference to the rules. The Planning Authority has itself assured that it will not grant completion certificate if any portion of the building is not in accordance with the rules.

7. As far as the Civil Suit is concerned, the trial Court is of the view that the appellants are not entitled to an injunction. In the circumstances it would be appropriate to leave the matter of grant of completion certificate to the Planning Authority who shall decide the grant or withholding the certificate according to rules. If the respondent is aggrieved by the decision of the Planing Authority, he shall be entitled to file an appeal in accordance with law which will be considered and decided.

8. In this view of the matter, there is no reason to entertain the appeal. The appeal is dismissed. By consent, the hearing of the suit is expedited. The learned trial Court shall decide the matter within a period of one year from the next date the parties appear before it. The interim order dated 19th October, 2006 and any other interim order stand vacated.

S.A.BOBDE, J.

sl.